

Au (Migration) [2018] AATA 2610 (12 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Thu Nguyet Au

VISA APPLICANT: Mr Van Minh Nguyen

CASE NUMBER: 1610189

DIBP REFERENCE(S): BCC2015/070968 BCC2015/2503180

MEMBER: Amanda Mendes Da Costa

DATE: 12 June 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the visa applicant's Partner (Provisional) (Class UF) visa.

1. Statement made on 12 June 2018 at 1:40pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional) visa – Genuine relationship – Traditional wedding ceremony – Validly married – Living in different countries – No major financial commitments – Inconsistent evidence – Review applicant's trips to Vietnam – Attended funeral of review applicant's parents – Travel dates do not match with Department's travel records – Credibility issues – No statements regarding the nature of the parties' relationship – Decision under review affirmed

LEGISLATION

Migration Act 1994 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), Schedule 2 cls 309.211, 309.221

CASES

Sing v MEAA [1996] FCA 1429

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 June 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).

3. The visa applicant is a national of Vietnam born on 24 April 1965. He applied for the visa on 17 April 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2) and cl.309.221.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the evidence demonstrated that the parties were in a genuine and continuing spousal relationship, nor that the parties had a mutual commitment to a shared life together to the exclusion of all others.
5. The review applicant seeks review of the delegate's decision and for that purpose provided the Tribunal with a copy of the primary decision.
6. The review applicant appeared before the Tribunal on 17 April 2018 and 10 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Nguyen, the visa applicant, by telephone from Vietnam.
7. The review applicant was represented in relation to the review by her registered migration agent.
8. For the following reasons, the Tribunal has decided to affirm the decision under review.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether –at the time of application – the visa applicant was the sponsor's spouse for the purposes of the Act (cl.309.211); and whether at the time of decision, the visa applicant continues to meet the requirements of cl.309.211 (cl.309.221).

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. The Tribunal notes that a copy of the bio-pages of Ms Au's passport is on the Department's file. On the basis of the information before it, the Tribunal is satisfied that Ms Au is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal notes that each of the parties was previously married. An order for decree nisi of dissolution of Ms Au's previous marriage was granted by the Family Court on 27 March 2002. Mr Van Minh's prior marriage was dissolved by order of The People's Court of Trang Bom District, Dong Nai Province on 10 November 2009. The parties were married to each other at Quyet Thang, Vietnam, on 20 January 2015. A copy of a marriage certificate dated 1 March 2015 was provided to the Tribunal and the Tribunal accepts this document as genuine. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s5F(2)(a).

Are the other requirements for a spousal relationship met?

Background

13. The parties claim to have met at the wedding of the review applicant's sister in Vietnam in April 2010. They spent time together and the relationship quickly developed into a romantic one. They agreed to marry on 1 May 2010, shortly prior to the review applicant returning to Australia on 9 May 2010.
14. On 25 December 2011 the review applicant returned to Vietnam and the parties held an engagement party on 31 December 2010. They stayed together before Ms Au returned to Australia on 16 January 2011.
15. Ms Au travelled to Vietnam between 19 May and 17 June 2012. Mr Nguyen lodged an application for a prospective marriage subclass 300 visa on 5 October 2012. On 11 October 2013, this application was refused.
16. The review applicant travelled to Vietnam on 30 December 2012 and returned to Australia on 25 January 2012. During this visit Ms Au's father died and the parties attended his funeral together.
17. On 24 December 2014 the review applicant again travelled to Vietnam. The parties held a wedding celebration with family and friends on 11 January 2015 and registered their marriage on 15 January 2015. The parties explained that whilst their engagement party was held at the home of the review applicant's parents, the wedding ceremony was held at the home of Mr Nguyen. This involved a traditional ceremony where the couple paid their respects to Mr Nguyen's ancestors. Following the ceremony, they held a celebratory party at a nearby restaurant. The parties told the Tribunal that approximately 15 members of Ms Au's family travelled by bus from her home town, to attend the wedding. The total number of guests was approximately 100 people.
18. The review applicant subsequently returned to Vietnam for three visits in 2017, for periods totalling approximately seven weeks. The parties told the Tribunal that during these visits they either lived together at the home of Ms Au's family or Mr Nguyen's house.

19. The financial aspects of the relationship

20. The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.
21. Ms Au is employed on a full time basis as a laboratory assistant. She rents a two bedroom apartment, which she shares with a nephew. She owns a motor vehicle and has negligible

savings. She does not own any real estate and any substantial assets. Mr Nguyen owns a house and land in Vietnam, where he farms black pepper. Since the death of his parents, he has lived alone and is responsible for all household expenses for the property in which he lives. Apart from his house and land, he owns no other substantial assets. Ms Au provided the Tribunal with a collection of receipts for money transfers she sent to Mr Nguyen in 2017 and 2018, totalling approximately AUD 3000.00. When the Tribunal asked Ms Au for the reason for her sending Mr Nguyen money, she said that until this year Mr Nguyen's business had been profitable but that this year's crop had been poor. She thought that it would 'cheer him up' to provide him some financial assistance to tide him over a difficult financial period. In his oral evidence, Mr Nguyen confirmed that his current crop was poor and his income this year would be substantially diminished.

22. Accordingly the Tribunal found some evidence that the parties have pooled their financial resources, although not in relation to major financial commitments. The Tribunal finds no evidence that the parties have acquired joint ownership of real estate or other major assets; or that the parties have any joint liabilities; or that one person in the relationship owes any legal obligation in respect of the other. The Tribunal finds that there has been some sharing of day-to-day household expenses when the parties have lived together in Vietnam. The Tribunal acknowledges that given the constraints of the parties living in different countries the sharing of such expenses has been limited.

23. The Tribunal attaches some weight to the financial aspects of the relationship.

24. *The nature of the household*

25. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
26. In their oral evidence the parties told the Tribunal that Ms Au had travelled to Vietnam on four occasions since their engagement in December 2010. On these occasions the couple have predominantly stayed at the home of Ms Au's parents in Soc Trang, apart from a week following their wedding in January 2015. During the short period of time that they stayed at Mr Nguyen's home, Ms Au and Mr Nguyen shared the responsibility for shopping, cooking and housework. On the occasions when they stayed together at Ms Au's family home, neither of them were responsible for housework and household tasks as Ms Au's family employ domestic staff for those tasks. The Tribunal also finds that the parties do not have any joint responsibility for the care and support of children.

27. The Tribunal attaches little weight to the household aspect of their relationship.

28. *The social aspects of the relationship*

29. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
30. The parties provided a collection of photographs including photographs of their engagement party and wedding celebrations; with family and friends at tourist destinations and restaurants; and several photographs which the parties claim depict them at the funerals of both of Ms Au's parents.
31. The Tribunal notes that there are no statements on the Department's file attesting to the opinions of the parties' friends and acquaintances about the natures of their relationship. Ms

Au and Mr Minh told the Tribunal that during the times that they have lived together in Vietnam they have undertaken joint social activities, including their engagement and wedding celebrations.

32. The Tribunal accepts there is some evidence that the parties represent themselves to other people as being married and notes that the applicant has provided the Tribunal with statements from Thi Kinh Nguyen and Thi Ngoc Chau Nguyen who are respectively Mr Minh's older sister and niece. Their statements attest to witnessing the wedding of Ms Au and Mr Minh but do not provide any further details regarding the parties' relationship.
33. The Tribunal places limited weight on the social aspects of the relationship.

34. *The nature of the persons' commitment to each other*

35. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
36. As the test of a genuine and continuing relationship involves consideration of the subjective intentions of the parties to the relationship; issues of the parties' credibility may assume particular importance: see *Sing v MEAA* [1996] FCA 1429 at [13] and [24] per Branson J. The Tribunal does not find the parties to be truthful witnesses and is concerned about their motives, particularly in light of the findings the Tribunal has made regarding their explanation for the statements they provided to the Department about the development of their relationship.
37. The Tribunal notes that the parties provided it with statements from Mr Nguyen's telephone account for the period June 2016 to April 2017. The Tribunal accepts that these statements evidence regular calls from Mr Nguyen to Ms Au throughout that period of time.
38. The parties told the Tribunal that they attended together the funerals of both Ms Au's parents. Ms Au said that the photograph of Mr Nguyen at her father's funeral, which was provided to the Tribunal, showed her husband wearing a headband, signifying that he was a close relative of the deceased. She explained that when her mother became unwell and subsequently died, Mr Nguyen had left his farm and travelled to be with her at the home of her parents. He assisted her with the care of her mother and supported her in her grief at the loss her mother.
39. Ms Au told the Tribunal that she and Mr Nguyen loved each other and had a "whole hearted" commitment and mutual love for each other.
40. The Tribunal notes that in his decision, the delegate found that the inception and development of the parties' relationship had not been presented in an accurate manner by the parties. In making this finding, the delegate relied on the following matters:
 - In written statements, the visa applicant and the sponsor stated that the sponsor's father passed away on 31 December 2012 and the sponsor could not travel to Vietnam to attend her father's funeral and that the visa applicant had helped the sponsors family during this difficult time on her behalf. They also stated that the sponsor travelled to Vietnam one year later for the sponsor's father's first death anniversary and that the parties were at the anniversary together.
 - At interview, the visa applicant confirmed the information in his written statements stop he confirmed that the sponsor did not travel to Vietnam for her father's funeral

and travelled to Vietnam for her father's first death anniversary. However, Departmental records indicated that the sponsor travelled to Vietnam on 30 December 2012, one day before her father's death and was in Vietnam during her father's funeral. The records also indicate that the sponsor did not travel to Vietnam in December 2013 for her father's first death anniversary.

- The Departmental records were made known to the visa applicant at an interview with Departmental staff on 5 January 2016. The applicant stated that he might've forgotten and made a mistake.
- After the interview, on 19 January 2016 the visa applicant provided a statement to explain the discrepancy between the parties claims in the Departmental records. The applicant stated that he was elderly and could not remember correctly.

41. The Tribunal notes that in her oral evidence, Ms Au told the Tribunal that she did in fact travel to Vietnam in December 2012 and was present when her father died and together with Mr Nguyen, attended her father's funeral. Ms Au provided a photograph depicting both herself and Mr Nguyen at her father's funeral. Ms Au initially also told the Tribunal that she visited Vietnam for the one year anniversary of her father's death in 2013, but later explained that she was confused and did not in fact return to Vietnam for the first anniversary of her father's death.

42. Pursuant to s359AA of the Act, the Tribunal put the above matters and the fact that in a statement she provided to the Tribunal dated 15 May 2017 Ms Au provided the following explanation for Mr Nguyen's earlier statement and interview with Departmental staff in which he said that Ms Au was not present at her father's funeral but travelled to Vietnam in December 2013:

"Firstly, the fact to the matter is my father passed away on the 31 December 2012 and I was in Vietnam from 30 December 2012 until 25 January 2013. My husband and I tended to my father's funeral and he spent those four weeks consoling me and tried to provide support to my family where ever possible. I did not return to Vietnam for my father's first death anniversary. I believe my husband was confused with regard to the dates because of the passage of time and the number of trips that I made back and forth from Australian and Vietnam. I believe this is a genuine oversight, not a deliberate intention to mislead the delegate".

43. The Tribunal invited Ms Au to comment on the fact that in her statement dated 15 May 2017 she does not refer to the reason for claiming in her statement dated 20 March 2015 that she did not attend her father's funeral but did travel to Vietnam in December 2013 for her father's first death anniversary.

44. Ms Au gave the following response to the above information:

- She had confused the dates of her visits to Vietnam and conceded that whilst she visited Vietnam in December 2012 for her father's funeral, she did not visit in December 2013 for his first death anniversary. However, she did attend for his second death anniversary in December 2014.
- She confirmed that she made a written statement to the Department dated 20 March 2015, in which she said that she had not attended her father's funeral in December 2012 but had travelled to Vietnam in December 2013. Ms Au explained that she gave instructions to her then migration agent in Vietnam, who prepared the statement for her to sign, in English, and she was unable to read it properly. She therefore relied on her migration agent who clearly made a mistake.

- In his interview on 5 January 2016, Mr Nguyen said that because he read something about a statement and was confused. After the interview, he asked someone to write a letter to the Department to say he had been confused when he spoke to them.
 - She acknowledged that signed the statement dated 15 May 2017, which she read thoroughly unlike the earlier statement dated 20 March 2015.
45. When asked by the Tribunal about his statement dated 20 March 2015 and his interview with Departmental staff on 5 January 2016, in which he stated that Ms Au did not attend her father's funeral in 2012 and visited Vietnam in December 2013 for her father's first death anniversary, Mr Nguyen explained that he was very nervous when making the statement and participating in the interview and made a mistake, saying something which was not correct. He explained that both he and Mrs Au attended the funeral of her father in December 2012.
 46. In his submissions at the hearing on 17 April 2018, Mr Le said that when the parties made the initial application for a subclass 300 visa for Mr Nguyen, they engaged the services of a registered migration agent in Australia. However, when the current application for the subclass 309 visa was made, they engaged the services of an unregistered migration agent in Vietnam. This agent prepared the statements dated for each of the parties. Mr Le submitted that Ms Au and Mr Nguyen were provided with the statements in English for signing and had the contents described to them by their migration agent. Given that Ms Au is not proficient in the English language and Mr Nguyen cannot read or speak English at all, they relied on their migration agent to accurately translate their instructions and convey the contents of the prepared statements to them.
 47. Mr Le further submitted that whilst Mr Nguyen initially gave incorrect answers about this matter during his interview with Departmental staff, he did provide a photograph to the Department, showing the parties attendance together at the funeral of Ms Au's father.
 48. Pursuant to s359AA of the Act the Tribunal put Ms Au that the Department's file contains two statements in the Vietnamese language, signed by her and Mr Nguyen and both dated 20 March 2015. The Tribunal put to Ms Au that these statements appear to replicate the statements in English which were signed by each of the parties on the same date. The Tribunal showed the contents of both statements to Ms Au and her migration agent. The Tribunal also asked the visa applicant about these statements.
 49. Ms Au acknowledged that she and Mr Nguyen each signed an English and Vietnamese version of the same statement on 20 March 2015. She told the Tribunal that she was too subjective and placed her trust in the previous migration agent in Vietnam who prepared the statements for herself and the visa applicant. She explained that there were time constraints in preparing the required documentation for the visa application, before she returned to Australia. Ms Au said that the agent advised her to sign two blank sheets of paper which were later used by the agent to complete her English and Vietnamese language statements. Ms Au said that she had not even dated the statements. She provided the correct information regarding the inception and development of her relationship with the visa applicant and relied of the agent engaged by her husband to correctly draft the statements. Ms Au told the Tribunal that she didn't have any knowledge of whether Mr Nguyen had signed blank or completed documents or completed statements.
 50. When asked about the circumstances in which the statements were prepared, the visa applicant told the Tribunal that before lodging the current visa application, he engaged a migration agent in Vietnam to prepare the documentation, including the statements signed by himself and his wife on 20 March 2015. He explained that he and Ms Au gave the necessary information to the agent who prepared the statements for them to sign. Mr Nguyen told the Tribunal that neither he nor Ms Au signed the statements without reading

them thoroughly. The visa applicant said that he was present when Ms Au signed her statements and that they were not blank pages.

51. Mr Nguyen further said that the parties had provided the Tribunal with a number of photographs and explained that what was depicted in those photographs was the reality of their relationship.
52. The Tribunal does not find either Ms Au or Mr Nguyen to be credible witnesses and does not accept their explanations to the Tribunal of the reason for initially telling Departmental staff that Ms Au was not present at the funeral of her father but was present in Vietnam for her father's first death anniversary. Nor does the Tribunal accept as credible the parties' accounts of the circumstances in which their English and Vietnamese language statements dated 20 March 2015 were created. The Tribunal notes further notes that Ms Au's second explanation during the hearing, of the circumstances in which her statements were prepared contradicts both her earlier explanation to the Tribunal about the preparation of her statements and contradicts Mr Nguyen's evidence that he and Ms Au signed statements which had been prepared for them by their migration agent. The Tribunal does not accept as credible Ms Au's evidence that she signed blank pages which were later completed and dated by her migration agent. Nor does it accept the parties' evidence that they were not aware when signing of the contents of the Vietnamese language version of their 20 March 2015 statement.
53. In their oral evidence the parties claimed that the photograph provided to the Tribunal, depicting them at the funeral of Ms Au's father, provides proof that both of them did in fact attend the funeral. The Tribunal accepts that the photograph is consistent with both Ms Au and Mr Nguyen attending the funeral of Ms Au's father. However, this does not affect the Tribunal's findings in relation to the credibility of the parties in relation to their statements made 15 March 2015.
54. On the basis of the evidence before it, the Tribunal accepts that the couple have lived together for short periods over the past seven and a half years and that at least between June 2016 and April 2017, they were in regular telephone communication. However, the Tribunal does not accept that the couple draw a substantive degree of companionship and emotional support from each other and is not satisfied that they view their relationship as a long-term one.
55. Having regard to all the circumstances of the relationship, the Tribunal is not satisfied that when the application was made and at the time of the decision, the review applicant and the visa applicant demonstrated a mutual commitment to a shared life to the exclusion of others. The Tribunal is not satisfied that their relationship is genuine and continuing. The Tribunal is not satisfied that they are not living separately and apart on a permanent basis. The Tribunal is not satisfied that the parties are in a spousal relationship.
56. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F (2) are met at the time the visa application was made and the time of this decision.
57. Therefore the visa applicant does not meet cl.309.211 and cl.309.221.
58. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

59. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).